U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date:
EAC 03 200 52026

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner seeks to classify the beneficiary pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the beneficiary qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner had not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of job offer.
> >
> > > (i) Subject to clause (ii), the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director found that the beneficiary qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as

"exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation, 22 I&N Dec. 215 (Comm. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on *prospective* national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

Eligibility for the waiver must rest with the alien's own qualifications rather than with the position sought. In other words, we generally do not accept the argument that a given project is so important that any alien qualified to work on this project must also qualify for a national interest waiver. At issue is whether this beneficiary's contributions in the field are of such unusual significance that he merits the special benefit of a national interest waiver, over and above the visa classification sought. By seeking an extra benefit, the petitioner assumes an extra burden of proof. The petitioner must demonstrate the beneficiary's past history of achievement with some degree of influence on the field as a whole. *Id.* at note 6.

This petition was filed on June 18, 2003. The documentation accompanying the petition consisted of the following:

1. A non-certified copy of Form ETA-750A, Application for Alien Employment Certification
2. A copy of Form ETA-750B, Statement of Qualifications of Alien
3. A copy of the beneficiary's Doctor of Science Diploma and its English translation
4. A copy of the beneficiary's Doctor of Philosophy Diploma and its English translation
5. A copy of the beneficiary's "Diploma With Excellence" in Physics and its English translation
6. A copy and English translation of the beneficiary's "Grade List" which accompanied the preceding diploma

In regard to the beneficiary's educational credentials, we note that any objective qualifications necessary for the performance of a security systems development position can be articulated in an application for alien labor certification. Pursuant to *Matter of New York State Dept. of Transportation*, an alien cannot demonstrate eligibility for the national interest waiver simply by establishing a certain level of education that could be articulated on an application for a labor certification.

On July 29, 2003, the petitioner was requested to submit an advisory evaluation of the beneficiary's formal education and evidence pertaining to the three eligibility factors set forth in *Matter of New York State Dept. of Transportation* (NYSDOT).

The petitioner failed to respond to the director's request for evidence.

On April 16, 2004, the director denied the petition stating:

> You were requested to submit additional documentation per the [NYSDOT] criteria. It is noted that two other Immigrant Petitions for Alien Worker (Form I-140) were filed along with the current petition. You were requested to submit additional documentation for those other petitions as well. In response, you did submit documentation for the other two petitions. You will receive a separate notification on those other petitions. However, you have not submitted the requested additional documentation for this current petition. As such, your petition will now be adjudicated on the basis of the evidence originally submitted.

The director adjudicated the initial evidence on its merits and found that the evidence of record was not adequate to meet the three-prong test established by *Matter of New York State Dept. of Transportation.* We concur with this finding.

On appeal, counsel states that the director's "decision is incorrect on the law and facts" and that the beneficiary "is performing work being used by the United States Military for homeland defense and security." The petitioner's appellate submission includes letters of support and documentation pertaining to his work. Neither counsel nor the petitioner addresses the director's observation that no additional documentation was submitted in response to the request for evidence.

In this matter, the petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. The petitioner failed to submit the requested evidence and now submits it on appeal. However, the AAO will not consider this evidence for any purpose. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). The appeal will be adjudicated based on the record of proceeding before the director.

The beneficiary's educational credentials demonstrate that he qualifies as a member of the professions holding an advanced degree, but they are not adequate to show that he qualifies for the additional benefit of a national interest waiver.

Counsel also cites the length of time involved with the labor certification process in New York. However, nothing in the legislative history suggests that the national interest waiver was intended simply as a means for employers (or self-petitioning aliens) to avoid the inconvenience of the labor certification process. The petitioner must still demonstrate that the beneficiary will serve the national interest to a substantially greater degree than do others in the same field.

For the reasons set forth above, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States. If the petitioner had wanted the evidence relating to the three-prong test established by *Matter of New York State Dept. of Transportation* to be considered, it should have submitted those documents in response to the director's request for evidence. Under the circumstances, the AAO need not and does not consider the sufficiency of the evidence submitted on appeal. Consequently, the appeal will be dismissed.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.